84-926

Office - Supreme Court, U.S.
FILED
DEC 11 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM 1984

EASTERN AIRLINES INC.
A Delaware corporation,

Appellant,

vs.

STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Appellee,

On Appeal From the Supreme Court of Florida

JURISDICTIONAL STATEMENT

KIMBRELL, HAMANN, JENNINGS, WOMACK, CARLSON & KNISKERN, P.A.

CHARLES A. KIMBRELL
SUITE 900 BRICKELL CENTRE
799 BRICKELL PLAZA
MIAMI, FLORIDA 33131
(305) 358-8181
Counsel for Appellant

JOSEPH F. JENNINGS
Of Counsel

54 pp

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
APPENDICES	

TABLE OF AUTHORITIES

Cases:	Pages
Allied Stores of Ohio v. Bowers, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959)	3, 4, 5
Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977)	4
Data Processing Service v. Camp, 397 U.S. 150, 25 L.Ed.2d 184, 90 S.Ct. 827 (1970)	5
Flast v. Cohen, 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968)	5
Madden v. Kentucky, 309 U.S. 83, 84 L.Ed. 590, 60 S.Ct. 406 (1940)	3
Maryland v. Louisiana, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2144 (1981)	4
Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 79 L.Ed. 1054, 55 S.Ct. 525 (1934)	6

TABLE OF AUTHORITIES (Continued)

Cases:	Pages
Walters v. City of St. Louis, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505 (1954)	3
Constitution, Statutes and Regulations:	
United States Constitution:	
Article 1, Section 8, Commerce Clause	2, 3
Fourteenth Amendment	2, 3
28 U.S.C., Section 1257(2)	2
Laws of Florida:	
Chapter 83-3	2
Florida Statutes:	
Section 212.08(4)	5
Section 212.70	5
Section 212.92	4

QUESTIONS PRESENTED

1. Whether certain provisions of Chapter 83-3, Laws of Florida, violate the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution by creating an arbitrary tax classification which invidiously discriminates against certain similarily situated common carriers.

2. Whether by providing tax credits to local farmers and fisherman, Chapter 83-3, Laws of Florida, unconstitutionally discriminates against interstate commerce in violation of the commerce clause of Article I, Section Eight, of the United States Constitution.

    a. Whether the Supreme Court of Florida erred in deciding that Appellant lacked standing to raise the constitutionality of the discriminatory refund provisions of the law.

CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM 1984

EASTERN AIRLINES INC.
A Delaware corporation,

Appellant,

vs.

STATE OF FLORIDA
Department of Revenue,

Appellee,

On Appeal From the Supreme Court of Florida

JURISDICTIONAL STATEMENT

LIST OF PARTIES

All of the parties appearing in the Supreme Court of Florida are listed in the caption. Appellant has no subsidiaries or affiliates, other than those wholly owned. It owns interest in other corporations listed in the Appendix. (App. E *infra*).

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 455 So.2d 311 (App. A, *infra*). The final Judgment of the Trial Court is not reported (App. B, *infra*).

JURISDICTION

Appellant appeals from the final order and judgment of the Supreme Court of Florida entered September 12, 1984, denying Appellant's petition for rehearing, and its decision entered June 14, 1984, holding valid a state tax statute. In its Complaint in the trial Court, and throughout the proceedings in the state courts, Appellant drew into question the validity of that Law on the grounds of its repugnance to the Constitution of the United States. Notice of Appeal was filed with the Clerk of the Supreme Court of Florida on November 28, 1984. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of Article I, Section 8 of the United States Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution, and the pertinent portions of the challenged State Statute, Chapter 83-3, Laws of Florida, are reprinted in the Appendix (App. F, *infra*).

STATEMENT

The Florida legislature enacted Chapter 83-3 effective April 1, 1983 which revised the tax structure of Chapters 212 and 220 of the Florida Statutes. Eastern Air Lines, Inc., filed suit in the Circuit Court of Leon County,

Florida, whereby it sought declaratory and injunctive relief from the enforcement of the tax act, alleging that the law violated the Commerce Clause of Section Eight of the United States Constitution and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. The Circuit Court of Leon County, after consolidating the case for purposes of trial with the similar case of *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, entered a Final Judgment dismissing Appellant's Complaint. (App. B, *infra*). On Appeal to the District Court of Appeal the case was certified to the Supreme Court of Florida.

The constitutional issues presented by Appellant to the Supreme Court of Florida, by briefs and oral argument, were the same as those raised in the initial pleading before the trial court. The Supreme Court of Florida specifically decided against Appellant on all issues now presented to this Court on Appeal. (App. A, *infra*).

The Supreme Court of Florida considered the issue raised by Appellant that the tax law unconstitutionally discriminates against interstate commerce but rejected it on the ground that Appellant lacked standing to challenge the provisions of the law.

The Supreme Court of Florida considered and specifically addressed the issues of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution and found that the statute met the tests of *Walters v. City of St. Louis*, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505 (1954); *Madden v. Kentucky*, 309 U.S. 83, 84 L.Ed. 590, 60 S.Ct. 406 (1940) and *Allied*

Stores of Ohio v. Bowers, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959).

Appellant is a common carrier certified by the Civil Aeronautics Board to provide, and it is providing, interstate and foreign as well as intrastate transportation for passengers, cargo and mail. The scheme of taxation in Chapter 83-3, Laws of Florida, §212.92, Florida Statutes, provides for a refund to farmers and fishermen of such taxes collected, to the direct detriment of Appellant by discriminating against interstate commerce. The effect of these refund provisions is to cast a greater burden of the tax on Appellant's conduct of interstate commerce as well as the interstate and foreign commerce of all airlines purchasing special fuel in Florida. The Supreme Court of Florida failed to consider *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977) and *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981). The lower court instead swept away all arguments on these important constitutional questions on the ground that Appellant lacked standing.

Although Appellant's initial pleadings clearly raised the constitutional questions, and alleged irreparable damage if enforcement of the statutory tax scheme was not enjoined, the question of standing was raised by Appellee for the first time in the Supreme Court of Florida. It was not raised by the initial pleadings nor was it the basis of the trial court's Final Judgment. In the context of whether Appellant has standing to raise the issue that the statutory tax provisions are repugnant to the commerce clause of the Constitution, the test to be applied is whether the interest sought to be protected by the Complaint is arguably within the

zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service v. Camp*, 397 U.S. 150, 25 L.Ed.2d 184, 90 S.Ct. 827 (1970). Speaking to a taxpayer's suit this Court stated in *Flast v. Cohen*, 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968): "In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in form historically viewed as capable of judicial resolution."

In addition, Chapter 83-3, Laws of Florida, Section 212.08(4), and Section 212.70, Florida Statutes, combine to invidiously discriminate against Appellant by granting an exemption on fuels used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission and by adopting an artificial initial price for such fuels. At the time this case was first appeared in the Supreme Court of Florida, Appellant was paying eighty three cents a gallon for its fuel. The effect of the artificial initial price of fuel is not a five percent tax on the price per gallon of fuel purchased by Appellant in the State of Florida but a tax of nearly seven percent. It is recognized that a state may make distinctions in classes so long as it proceeds on a rationale basis and does not resort to palpably arbitrary classifications.

The test is whether the classification rests on some ground of difference having a fair and substantial relation to the object of the legislation so that those in similar situations will be treated equally. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 3 L.E.2d 480, 79 S.Ct. 437 (1959). Here the classification, except for aircraft,

is common carriers. This is the same unequal and arbitrary classification which this Court found to be unjustifiably unequal, whimsical and arbitrary in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 79 L.Ed. 1054, 55 S.Ct. 525 (1934).

CONCLUSION

The questions presented are substantial and are of public importance. Appellant submits that probable jurisdiction should be noted, and the case should be set for argument together with the case of *Delta Air Lines, Inc v. State of Florida, Department of Revenue.*

Respectfully submitted,

KIMBRELL, HAMANN,
JENNINGS, WOMACK,
CARLSON & KNISKERN, P.A.
Suite 900, Brickell Centre
799 Brickell Plaza
Miami, Florida 33131

By: _____
CHARLES A. KIMBRELL
Attorneys for Appellant

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Appellant's Jurisdictional Statement was mailed to LARRY LEVY, ESQ. General Counsel, Department of Revenue, Room 102, The Carlton Building, Tallahassee, FL 32301, and JOSEPH C. MELLICHAMP, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32301, this 11th day of December 1984.

KIMBRELL, HAMANN,
JENNINGS, WOMACK,
CARLSON & KNISKERN, P.A.
Suite 900 Brickell Centre
799 Brickell Plaza
Miami, Florida 33131

BY: _____
CHARLES A. KIMBRELL
Attorneys for Appellant

Appendices

INDEX TO APPENDICES

APPENDIX		Page
A.	Opinion of Supreme Court of Florida	2
B.	Judgments and Opinions of Trial Court	15
C.	Order on Rehearing	33
D.	Notice of Appeal	34
E.	List of Parties	36
F.	Constitutional and Statutory Provisions	37

APPENDIX A

OPINION OF SUPREME COURT OF FLORIDA
SUPREME COURT OF FLORIDA

NO. 63,949

EASTERN AIR LINES, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

[June 14, 1984]

ADKINS, J.

The case is before us on an order from the First District Court of Appeal certifying the issues in the case to be of great public importance. We have jurisdiction. Art. V, §3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Eastern Air Lines in the circuit court of Leon county seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the grounds that the law was unconstitutional. Specifically, Eastern alleged that the law violated the equal protection and due process clauses of the Florida and United States Constitutions, was an unconstitutional delegation of legislative authority, and violated the commerce clause of the United States Constitution. By stipulation, the parties agreed to a procedure whereby

Eastern was allowed to self-accrue the sales tax imposed under chapter 83-3, which became effective on April 1, 1983, during the pendency of the proceedings subject to certain conditions. The trial judge entered his final judgment in this case on May 27, 1983, incorporating the order he had entered in a similar action filed by Delta Airlines and upholding the constitutionality of chapter 83-3. On June 24, 1983, Eastern filed its notice of appeal with the First District Court of Appeal. On July 12, 1983, that court issued its order certifying the case for immediate resolution by this Court.

Chapter 83-3 was enacted during a special session of the Florida legislature which was called for the express purpose of addressing road transportation and public transit needs in the state. The law revises the tax structure of chapters 212 and 220 of the Florida Statutes. The new law eliminates one-half (4 cents) of the excise tax imposed by former chapter 206, Florida Statutes (1981), on fuel purchased for road transportation use and imposes a five percent sales tax on this fuel through the new Part II of former chapter 212, chapter 83-3, section 6. That section bases the five percent sales tax on a predetermined price for fuel of $1.148 per gallon. The new sales tax is imposed on all aviation jet fuel purchased by interstate air common carriers, but is not imposed on railroads and vessels due to the proration provision which applies to railroads and vessels allowing taxation based on cost and only on the carrier's intrastate mileage. Ch. 83-3, §5 (amends §212.08(4). Fla. Stat. (Supp. 1982)). Section 4 of the law provides:

> (4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or

carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

The first issue which we will address is Eastern's contention that the proration provisions, which do not apply to airlines, violate concepts of equal protection by not treating all common carriers alike. Eastern asserts that all interstate carriers, whether they be airlines, railroads, trucks or vessels, are similarly situated for fuel tax purposes. The circuit court found that Eastern did not sustain its burden of demonstrating that the classification is hostile and oppressive and held that there "is no invidious discrimination by the creation of an arbitrary classification." The court's order states: "Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature." The court cited the example of the airlines being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to chapter 80-368, Laws of

Florida, while vessels and railroads are not. The court also noted that proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean to avoid the accumulation of intrastate mileage.

When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated unsurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83 (1940); *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores v. Bowers*, 358 U.S. 522 (1959).

We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classifications at issue could rationally be based. The

modes of transportation are inherently and essentially different. The classification drawn does not violate concepts of equal protection.

Eastern also argues that the statute, by adopting an initially established fuel price of $1.148 per gallon upon which to base the tax rate, violates concepts of equal protection and unconstitutionally restricts the rights of individuals to contract. The provision being challenged reads as follows:

> §212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—
>
> (3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:
>
> (a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is §1.148 per gallon.

Eastern asserts that the price set is not related to the actual price of aviation fuel and, therefore, is arbitrary and unreasonable. We do not agree. The tax is levied on first withdrawal of the fuel from the storage tanks and is imposed on all consumers equally regardless of the nature of transport. We find no merit in Eastern's argument that the predetermined price structure invidiously discriminates against airlines.

Eastern also contends that section 6 of the law constitutes an improper delegation of legislative power by relating the price adjustment for future periods to the percentage change in the average monthly gasoline price component of the Consumer Price Index issued by the United States Department of Labor. The Consumer Price Index referred to in the law is authorized by 29 U.S.C. §§ 2, 2a and 2b (1976). Under these code provisions, the Secretary of Labor has broad powers to collect, collate and report statistics, and, to that end, has the power to use bureaus provided for the department and is authorized to call upon other departments of the federal government for data and the results obtained by them. More importantly, the Secretary of Labor may "collate, arrange, and publish such statistical information so obtained in the same manner as to him may seen wise." 29 U.S.C. §2. The Consumer Price Index is widely used by the federal government to determine such things as cost of living increases in

social security, retirement benefits for the military, and other appropriations such as child care payments.

The circuit court in its final judgment determined that the method of appropriation in chapter 83-3 is equivalent to the method which allowed the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index and which was found to be constitutional in *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979). Eastern argues that the instant case should be distinguished from *Gindl* because here the Department of Revenue is delegated to determine the price upon which the tax will be based by using a federal agency's index to be adopted in the future and over which no Florida agency has any control. Eastern argues that since the department, in arriving at the tax applicable to the price, must, of necessity, rely on an administrative act of the United States Department of Labor which will first take place on March 1, 1984, the legislature has shifted its constitutional duties to that federal agency contrary to the established rule of this state, citing as authority this Court's decision in *State v. Welch*, 279 So.2d 11 (Fla. 1973).

In *State v. Welch*, this Court considered the constitutionality of a portion of the former Florida Drug Abuse Law, chapter 404, Florida Statutes (Supp. 1972), which purported to prohibit certain acts by reference. Specifically, the law declared that it was the intent of the legislature to include under that chapter "all drugs controlled by the drug abuse laws of the United States, now or in the future," in addition to those specified under Florida law. §404.515, Fla. Stat. (Supp. 1972). In *Welch* this Court looked to the rule of

law announced in *Freimuth v. State*, 272 So.2d 473 (Fla. 1972). There, the Court said that the legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or an administrative body might see fit to adopt in the future. 272 So.2d at 476. Accordingly, this Court held the statute unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida. *Id.*

We believe that Eastern's reliance on the aforementioned language is misplaced. The statute under attack merely provides that an adjustment be made to the fuel price which is based on the percentage change in the average monthly gasoline price component of the Consumer Price Index. Here, the legislature is merely setting forth the manner in which the department is to determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. We think the language of *Welch* and *Freimuth* should be interpreted to apply to statutes which incorporate federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Furthermore, we do not agree with Eastern's contention that the statute is also constitutionally infirm because the Department of Revenue will utilize a

consumer price index which is to be determined *after* the effective date of the act. In *Gindl* we upheld a statutory provision which required a computation based on the most recent publication of the Florida Price Level Index prepared by the Department of Administration. The statute was to take effect July 1, 1976. The Department of Education intended to base the distribution on a survey which would be started in October or November of 1976 and completed during the early part of 1977. In other words, the effect of the statute was to reach forward and allow distribution to be calculated on the most recent publication of the Florida Price Level Index, an index which was not in existence when the law became effective. We agree with the circuit court's determination that the method of appropriation in chapter 83-3 is equivalent to the method approved in *Gindl.*

The final issue which Eastern has raised is whether chapter 83-3 unconstitutionally discriminates against interstate commerce since its tax credit provisions provide a direct commercial advantage to local agriculture and commercial fishing to the detriment of similar interstate activities. The relevant section of the law provides:

> §212.92 Refunds.—
> (e) Refund to farmers and fishermen.—
>
> 1. [A]gricultural purposes means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or

operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms.

2. For the purposes of this paragraph, 'commercial fishing purposes' shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

The Department of Revenue questions Eastern's standing to challenge chapter 83-3's full refund provisions, section 212.92(1)(e), 2. & 3., since Eastern is "neither in the *fishing* or *farming business* and . . . Eastern does not contend that farmers and/or fishermen are in direct or indirect competition with their airline enterprise." Eastern does not compete with fishing or agriculture. We agree that Eastern does not have standing to raise the unconstitutionality of these full refund provisions. In *State ex rel. Clarkson v. Philips*, 70 Fla. 340, 70 So. 367 (1915), this Court held that the constitutionality of

a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties.

It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent. *Cramp v. Board of Public Instruction*, 137 So.2d 828 (Fla. 1962).

Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. *Kass v. Lewin*, 104 So.2d 572 (Fla. 1958). This Court succinctly summarized the general rules regarding severability in *Presbyterian Homes of Synod v. Wood*, 297 So.2d 556 (Fla. 1974), wherein the Court stated:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are

> void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

Id. at 559.

We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Accordingly, we affirm the order of the circuit court.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and SHAW, JJ., Cocur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-855—Certified by the District Court of Appeal, First District, Case No. AT-359

Joseph F. Jennings of Kimbrell, Hamann, Jennings, Womack, Carlson and Kniskern, Miami, Florida,

for Appellant

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Department of Revenue, Tallahassee, Florida,

for Appellee

APPENDIX B

JUDGMENTS AND OPINIONS OF TRIAL COURT

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

CASE NO. 83-855

EASTERN AIR LINES, INC.,
a Delaware corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT
OF REVENUE,

Defendant.

FINAL JUDGMENT

The above cause was consolidated with Case No. 83-761, Delta Air Lines, et al v. State of Florida, Department of Revenue, and, by consent of the parties, was tried and argued before this Court on May 12, 1983. The Court has considered the pleadings, evidence, and argument and briefs of counsel for the parties, and being otherwise advised, it is

ORDERED AND ADJUDGED:

For the reasons stated in the Final Judgment dated May 23, 1983 in abovementioned Delta Air Lines case,

No. 83-761, the Complaint in this cause is dismissed finally. A copy of said final judgment in Case 83-761 is hereto attached and by reference is made a part hereof.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 27th day of May, 1983.

/s/ BEN C. WILLIS
Ben C. Willis
Circuit Judge

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

CASE NO. 83-761

DELTA AIR LINES, INC.,
a Delaware corporation, et al.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT
OF REVENUE, et al.,

Defendants.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and argument of counsel for the respective parties, and on the briefs of counsel for the parties, intervenors and amicus curias, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Florida Statutes, titled "an act relating to transportation finance and administration" violates

a) its constitutional right to equal protection under the United States and Florida Constitutions,

b) the Commerce Clause of the United States Constitution,

c) Article III, Sections 10 and 11 of the Florida Constitution.

Intervenor Eastern Airlines also asserts Senate Bill 8-A is an improper delegation of legislative authority. Plaintiff prays for declaratory and injunctive relief to prevent Defendant Department of Revenue (DOR) from assessing and collecting such tax.

2. Senate Bill 8-A was signed into law on March 8, 1983 to become effective April 1, 1983. It revises the tax structure of Chapter 206, 212, and 220, Florida Statutes. Prior to the enactment of said Bill motor fuel was taxed pursuant to Part I, Chapter 206 at the rate of 8 cents per gallon as follows:

a) a "first gas tax" of 4 cents to be used for maintenance and construction of state road,

b) a "second gas tax" of 2 cents to be used by counties to secure bond obligations,

c) a "seventh-cent tax" used by counties for public transportation, and

d) an "eighth-cent tax" used by municipalities for transportation-related expenditures.

Prior to the enactment of Senate Bill 8-A special fuel was taxed pursuant to Part II, Chapter 206 at the rate of 8 cents per gallon with distribution the same as

Part I, Chapter 206. Aviation fuel was exempt from Part II.

Prior to the enactment of Senate Bill 8-A, pursuant to Chapter 212, common carriers paid a sales tax of 5% of the sales price of fuel, such tax accruing and being collected upon first withdrawal from the storage facility. This tax was prorated according to the ratio of the interstate mileage of the carrier to its total mileage for the previous fiscal year.

Prior to the enactment of Senate Bill 8-A, Chapter 220 imposed an income tax on corporations without credit for motor or special fuel taxes paid.

3. Senate Bill 8-A eliminates the "first gas tax" of Part I, Chapter 206 in 206.41 and reduces the special fuel tax in Part II from 8 cents to 4 cents. Distribution is the same as prior to enactment. Thus, under both Part I and Part II of Chapter 205 the tax is reduced from 8 cents to 4 cents per gallon.

Under Chapter 212, the Bill now imposes a 5% sales tax on motor and special fuel based on a predetermined price of $1.148, or 5.7 cents, per gallon until June 1, 1985, at which time the DOR will determine the price according to the most recent Consumer Price Index. Distribution is for "transporation purposes" per Section 206.46 from a Transportation Trust Fund. The Chapter 212 tax upon common carriers will continue to be prorated by intrastate mileage; however airlines will be taxed on all aviation fuel purchased in Florida, regardless of use in interstate or intrastate travel. Chapter 220 now affords a 50% or $5 million (the lesser)

credit to Florida-based corporations with 1,200 or more employees.

4. Plaintiff objects to Senate Bill 8-A on the grounds it violated equal protection by subjecting them to different tax treatment than other common carriers, creates a classification which is discriminated against by higher tax rates, subjects them to a predetermined price not related to the actual price of aviation fuel, and discriminates against foreign corporations by allowing the Chapter 220 tax credit only to corporations with their corporate or home office in Florida.

Plaintiff alleges Senate Bill 8-A violates the United States Constitution Commerce Clause by exceeding the state limitations in taxing interstate commerce because the apportionment is unfair and not based on intrastate use, agricultural and fishing interests are favored by total fuel tax exemption, the tax credit is an attempt to force corporations to establish corporate offices in Florida, there is no nexus between the tax on airlines and the use of funds for roads, and the tax is not fairly related to services provided to interstate airlines.

Plaintiff originally claimed Senate Bill 8-A violated Article III, Sections 10 and 11 of the Florida Constitution because it was a special law. However, in light of the recent Supreme Court decision in *Department of Legal Affairs, State of Florida, et al. v. Sanford-Orlando Kennel Club, Inc.*, 8 F.L.W., (Fla. April 14, 1983), in which the Court stated it did not matter that the legislature was aware the bill would benefit a certain business, Plaintiff has abandoned this obligation. Plaintiff had originally

prayed for attorneys fees pursuant to 42 U.S.C. 1983 and 1988, which issue this court ruled against in a hearing May 11, 1983.

5. Plaintiff Delta Airlines is a Delaware corporation registered to do business in Florida and certified by the Civil Aeronautics Board. They operate from 9 airports in Florida and employ approximately 4,000 employees. Intervenors are various airlines subject to the fuel tax whose appregate employees number approximately 1,800. None of the intervenors are qualified to receive the Chapter 220 tax credit either because of size or location outside Florida. Delta claims irreparable injury of $9.7 million per year without retroactive interest if Senate Bill 8-A is declared unconstitutional, prolonged legal proceedings, invidious discrimination without remedy, and competitive advantage to other classes of common carriers and Florida-based corporations. For these reasons, Plaintiff requests an immediate temporary injunction followed by a permanent injunction and declaratory relief.

6. Defendant DOR contends Senate Bill 8-A is a valid tax measure reasonably related to the legitimate state purpose of stabilizing tax structures and therefore is not subject to the constitutional infirmities urged by Plaintiff. Defendant contends that it has long been established that sales and use taxes imposed for the privilege of engaging in business in the state are valid. *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950); *Kirk v. Western Contracting Company, Inc.*, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535, app. dism. 226 So.2d 815: *Florida Revenue Commission v. Maas Brothers, Inc.*, 226 So.2d 849 (Fla. 1 DCA 1969), cert den. 237 So.2d 177. Plaintiff elaborates on the point that Senate Bill

8-A is a user fee and not fairly related to the airlines use of public facilities or roads. However, as Defendant points out, this is an excise tax, not a user fee, and "the constitutional power to levy taxes does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933) at page 269.

EQUAL PROTECTION

The three main areas of Plaintiff's complaint in the equal protection area are: partial exemptions to other common carriers, predetermined price unrelated to actual price of aviation fuel, and discriminatory tax credit structure.

First, Plaintiff asserts that all common carriers should be treated alike and airlines should also receive the prorated treatment under Chapter 212 that other common carriers receive. Plaintiff cites cases to support this assertion that interstate carriers are "similarly situated" for tax purposes, *Seaboard Air Lines Ry. v. Simon*, 47 So. 1001 (Fla. 1908) where all carriers are liable for lost or damaged goods; *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954) that imposition of taxes on aircraft must be the same as for riverboats; *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949) that water transportation taxed same as other carriers; *Delta Air Lines, Inc., v. State of Alabama*, No. CV-1162 (Cir. Ct. Montgomery, Ala. May 27, 1981) that airlines are not utilities and receive the same treatment as other transportation modes. Defendant counters that states have wide latitude in taxation and creating classifications.

In *Madden v. Kentucky*, 309 U.S. 83 (1940) the Supreme Court stated at page 88:

> "In taxation even more than in other fields, legislatures possess the greatest freedom of classification."

The Supreme Court has upheld tax classification in ad valorem taxation of corporations, *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973), reh. den. 411 U.S. 910; and exempting non-residents from ad valorem taxes on merchandise held in warehouses, *Allied Stores of Ohio v. Bowers*, 348 U.S. 522 (1959), where the Court states there is "no iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation", p. 526.

The courts of Florida have followed *Lehnhausen*, *Madden*, and *Allied Stores* in *Markham v. Yankee Clipper Hotel, Inc.*, et al., 427 So.2d 383 (Fla. 4th DCA, 1983); and in *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229 (Fla. 1968), in which the Florida Supreme Court states at p. 232:

> "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

The Florida Supreme Court has upheld the constitutionality of Chapter 212 in *Gaulden v. Kirk*, 47

So.2d 567 (Fla. 1950) where a 3% tax was imposed on rentors and lessors of living quarters, but accommodations rented for longer than 6 months and two-family apartment buildings were exempt. The court held this to be a reasonable classification. Likewise the distinction between airlines and other carriers is a reasonable classification and Plaintiff has not sustained its burden to "negative every conceivable basis which might support it". *Just Valuation*, supra.

Plaintiff maintains that this distinction is arbitrary and unreasonable and will not pass constitutional muster, citing *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U.S. 459 (1937), to support the allegation that two different forms of business cannot be treated differently. Plaintiff states that airlines and common carriers have been treated similarly for fuel tax purposes since 1963, and that the new bill singles out airlines to pay a disproportionate share of tax. However, Plaintiff does not sustain its burden to demonstrate this classification is "hostile and oppressive" per *Just Valuation*, and this court therefore holds there is no invidious discrimination by creation of an arbitrary classification. Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature. For example, airlines enjoy the advantage of being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to Chapter 80-368. Vessels and railroads are not exempt. Even though Plaintiff argues that 80-368 also benefits hotels, restaurants, and racetracks, it does not object to this favorable classification and only when

disadvantaged does Plaintiff object. Also, pro-ration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage. Defendant approximates that in the past airlines were paying only about 6% of their actual tax due to these flight patterns to avoid flying over the state.

Second, Plaintiff asserts the predetermined price of $1.148 per gallon is not related to the actual price of aviation fuel which customarily is less expensive and at the time of writing was about $.90 per gallon. Plaintiff would have the DOR adjust the price as market price fluctuates and tax aviation fuel at the lower rate. This suggestion is not feasible because of the varying prices in different locations, the volatile nature of gas prices, and the objective of the legislature to have a stabilized tax structure. Rather than discriminate against airlines, the legislature has imposed a set price per gallon and all consumers are taxed equally regardless of nature of transport. The tax is levied on first withdrawal from the storage tanks and not at the retail level which latter price would be relatively impossible to ascertain. Plaintiff urges the court to allow the airlines to self-assess taxes as in the past and insists there have been no problems previously. However, as DOR points out, the discrepancy in self-assessment renders this point meritless. For the foregoing reasons, this court holds the predetermined price structure does not invidiously discriminate against airlines.

Third, Plaintiff maintains the Chapter 220 tax credit structure favors local business and disadvantages foreign corporations registered in Florida but without a home office there. Plaintiff cites *Department of Revenue v.*

Amrep, 358 So. 2d 1343 (Fla. 1978) for the proposition that once a corporation is admitted to be registered in a state, it enjoys the full equal protection of the law. This is true, but it also must bear the cost of being privileged to do business in the state. Plaintiff contends that state attempts to tax foreign corporations more stringently than domestic corporations have been invalidated in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949) dealing with intangible tax on accounts receivable; and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968) which afforded out-of-state non-profit corporations tax exemptions equal to domestic non-profit corporations; and *O'Connell V. Kontojohn*, 179 So. 802 (Fla. 1938) which invalidated a discriminatory Pensacola tax based on non-city residents who operated bakery trucks in that city. However, the Senate Bill 8-A tax credit is valid because there is a rational basis behind allowing such credit for domestic corporations: encouraging foreign corporations to establish home offices in Florida. Further, the Supreme Court states in *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495 (1936) at page 509:

> "The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis."

Therefore, if the legislature reasonably believes a tax credit for domestic corporations will further its objective of encouraging in-state incorporation, it may afford this more favorable treatment without discrimination. Just as the legislature enjoys wide latitude in taxation and classifications, it has wide latitude in promoting business where the public interest is served. *Carmichael* at page 512. In *Sanford-Orlando Kennel Club*, supra,

the Florida Supreme Court states that the legislature may benefit a certain class so long as it is not unreasonable. There is no unreasonable burden on airlines to establish a home office in Florida if they wish to receive a tax credit. Also, this tax credit is on corporation income tax, not on the sales tax, so a corporation must first pay corporate income tax to avail itself of the Chapter 220 credit. For these reasons, this court holds the tax credit does not favor local business nor discriminate against foreign corporations.

COMMERCE CLAUSE

Plaintiffs contend that Senate Bill 8-A is a state attempt to regulate commerce between the states and exceeds state limitations pursuant to the United States Constitution, Article I, Section 8, Clause 3 grant to Congress. Assuming this bill affects interstate commerce, the state tax must meet the four prongs of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), set out on page 278 of that opinion:

1) activity taxed has a sufficient nexus with the State,
2) the tax may not discriminate against interstate commerce,
3) the tax must be fairly apportioned; and
4) the tax must be related to services provided by the state.

Plaintiff contends that Senate Bill 8-A fails at least two prongs of this test because this is a road use tax unrelated to airline services, and because the tax is not fairly

apportioned and favors certain carriers and local businesses. Plaintiff insists this is a "user" tax because Governor Graham called this session to raise $250 million to fund road construction and maintenance. However, the working of section 206.46 specifically eliminated reference to "construction and maintenance of state roads" in allocation funds from the State Transportation Trust fund into which the fuel taxes are deposited. Instead, the section is worded to provide funds for "transportation purposes" which includes airports and aircraft services, contrary to the assertion of Plaintiff. Plaintiff maintains that because these funds are used for roads and airlines do not use roads, the tax is unrelated to services provided by the state. This is obviously not the case, as the legislature expressly included all transportation purposes in the allocation of funds.

Plaintiff attempts to convince the court that this is a user tax and not an excise tax and is therefore subject to a higher standard of scrutiny. This argument is flawed. As previously noted, favoring local businesses is not necessarily unreasonable or arbitrary. In the case of the Chapter 220 tax credit, Plaintiff is not unreasonably disfavored as there is a legitimate state purpose in encouraging corporate home offices to locate in Florida and to otherwise attract industry to the state. Plaintiff can merely incorporate in Florida if it wishes to receive the credit. Use of public airport facilities is a privilege the airlines enjoy and they should share the cost of these facilities so long as the cost is reasonable. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) supports this statement and goes on to say that courts should not inquire into the amount of the tax or value of benefit received. In *Montana*, a severance tax

on coal mined in Montana was upheld as a general revenue tax even though 90% was shipped out of state. Plaintiff tries to distinguish this case, saying Senate Bill 8-A is a use tax. However, this distinction does not withstand scrutiny. The court in *Montana* made it very clear that a state can regulate interstate commerce so long as there is no discrimination. In the case at bar the tax is levied upon all consumers equally based on the quantity of fuel withdrawn and there is no discrimination. The Supreme Court of the United States also deferred to the legislature in establishing tax measures in *Montana*. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), a "use" charge for enplaning passengers was upheld as rationally related to the use of facilities, even though such charge was "imperfect". Therefore, even if the Florida fuel tax were considered a use tax, this tax is valid because the funds are allocated for "public transportation" including air facilities, and according to *Montana* the benefit does not have to be measured with mathematical accuracy. The *Complete Auto* test prong #4 does not require a proportional relation of tax to benefit receive, but only requires that the tax be related to the services provided. *Complete Auto* also states that interstate commerce must pay its own way, similar to the reasoning in *Montana*.

To support its contention that Senate Bill 8-A favors local business by extending a tax credit only to Florida-based corporations, Plaintiff cites *Maryland v. Louisiana*, 451 U.S. 725 (1981) where a tax on natural gas pumped out-of-state created a burden on interstate commerce. Here the tax is on fuel purchased in the state and all consumers are taxed equally so there is no

similar burden on interstate commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) involves a New York statute which taxed out-of-state transfers. Here the legislature is not trying to tax any out-of-state transaction. In *Archer Daniels Midland Co. v. State*, 315 N.W2d 597 (Minn. 1982), a tax exemption for gasohol produced from Minnesota products with no comparable exemption for out-of-state product production, was declared invalid as a restriction on interstate commerce. Senate Bill 8-A in no way affects out-of-state production or consumption. The Florida Supreme Court has upheld special tax exemption to encourage Florida industry. *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240 (Fla. 1970). This court likewise finds there is no burden on interstate commerce by Senate Bill 8-A and no violation of the Commerce Clause.

IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY

Intervenor Eastern Airlines raises an additional point that Senate Bill 8-A is an improper delegation of legislative authority by allowing the DOR to determine the fuel fixed price after June 1, 1985. *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979, corrected on rehearing 1981) allows the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Indix. The method of appropriation in Senate Bill 8-A is equivalent to the *Gindl* method and is a proper delegation of authority.

SEVERABILITY

Both parties agree that this bill should not be severed in part. Additionally, there is no severability

clause in the bill. However, in view of the rulings made herein, it is unnecessary to consider or determine any questions of severability.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Section 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

B. It is further found that the reference to the Consumer Price Index in future applications of the price per gallon to be used in computing the tax is not an unlawful delegation of legislative power. The Consumer Price Index is a computation by governmental agency of average prices of items of commerce. Reference to this measure is not a delegation of legislative discretion but an economic computation relied upon to apply a legislative policy of a tax based upon an approximate price prevailing at a given time.

C. All challenges to the validity of this statute are found to be without merit.

D. All prayers that the Defendant Department of Revenue be restrained from enforcement of Chapter 83-3 or collecting taxes imposed thereon are hereby denied.

E. The Amended Complaint and this cause be and the same are hereby dismissed finally.

DONE AND ORDERED, this 23rd day of May, 1983.

/s/ Ben C. Willis

Ben C. Willis
Circuit Judge

APPENDIX C

ORDER ON REHEARING

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 12, 1984

CASE NO. 63,949

Circuit Court Case No. 83-855
(Leon)

EASTERN AIR LINES, INC.,
Appellant,

vs.

DEPARTMENT OF REVENUE,
Appellee.

On consideration of the motion for rehearing filed by attorneys for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

APPENDIX D

NOTICE OF APPEAL

Filed November 28,1984

SUPREME COURT OF FLORIDA

CASE NO. 63,949

EASTERN AIR LINES, INC.,
a Delaware corporation,

Appellant,

vs

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that EASTERN AIR LINES, INC., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order and Judgment of the Supreme Court of Florida rendered on September 12th, 1984, denying Appellant's Motion for Rehearing, and its decision rendered on June 14, 1984, affirming the Final Judgment of the Circuit Court in and for Leon County, Florida, dismissing the Appellant's Complaint against the Appellee.

This appeal is taken is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

KIMBRELL, HAMANN, JENNINGS,
WOMACK, CARLSON & KNISKERN, P.A.
Suite 900, Brickell Centre
799 Brickell Plaza
Miami, FL 33131

By /s/ Joseph F. Jennings
Joseph F. Jennings
Attorneys for Appellant

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed to LARRY LEVY, ESQ., General Counsel, Department of Revenue, Room 102, The Carlton Building, Tallahassee, FL 32301, and JOSEPH C. MELLICHAMP, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32301, this 26th day of November, 1984.

KIMBRELL, HAMANN, JENNINGS,
WOMACK, CARLSON & KNISKNER, P.A.
By /s/ Joseph F. Jennings
Joseph F. Jennings
Attorneys for Appellant

APPENDIX E

LIST OF PARTIES

CORPORATE PARTY'S AFFILIATIONS

Apart from Appellant's several wholly owned subsidiaries, Appellant is a corporation that owns an interest in other corporations, which corporations and the ownership interest are as follows:

Aeronautical Radio, Inc.	9.1%
Air Cargo, Inc.	17.6%
Air Cargo Facilities, Inc.	7.6%
Airlines Clearing House, Inc.	4.1%
Airline Tariff Publishers, Inc.	11.9%
Arizona Fuel Facilities	7.7%
Atlanta Air Terminal, Inc.	14.3%
Bradley Facilities, Inc.	9.5%
International Aeradio (Caribbean), Ltd.	5.0%
Manhattan Air Terminal, Inc.	12.5%
Portland Fuel Facilities	5.6%
Societe Int'1 de Telcom	0.5%
Tinicum Fuel Facilities Corp.	33.3%

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

The Commerce Clause of Article I, Section 8, of the United States Constitution provides in relevant part that:

> SECTION 8. The Congress shall have Power To . . .
>
> To regulate Commerce with foreign Nations, and among the several States, . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 83-3, Section 5, amending Section 212.08(4), Florida Statutes 1982

(4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

Chapter 83-3, Section 6, creating Section 212.70, Florida Statutes

§212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—

(3) Prior to June 1 of each year, the department shall determine the appropriate

sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

Chapter 83-3, Section 6, creating Section 212.92, Florida Statute

§212.92 Refunds.

(1) The following refunds shall apply to the tax imposed by this part, to the extent provided herein:

(e) Refund to farmers and fishermen.—

1. For the purposes of this paragraph, "agricultural purposes" means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms. The transporting of bees by water and the operating of equipment used in the apiary of a beekeeper shall be also deemed an agricultural purpose.

2. For the purposes of this paragraph, "commercial fishing purposes" shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who used any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.